

## FOIA AND LOCAL GOVERNMENT

### OFFICIALS

#### RECORDS

#### WHAT is a PUBLIC RECORD?

ALL writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

All public records are open to the public UNLESS a specific exemption in law allows the record to be withheld.

#### WHAT about RETENTION of PUBLIC RECORDS?

Public records MUST be retained according to retention schedules set by the Library of Virginia. The length of retention depends on the content of the record. After expiration of the applicable retention period, the records may be destroyed or discarded.

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#### E-MAILS

Emails that relate to the public business are public records, regardless whether you use your home or office computer.

## FOIA AND LOCAL GOVERNMENT

### OFFICIALS

As such, these emails must be retained as required by the VA Public Records Act. For practical advice for email use, access and retention, see FOIA Council handout entitled "Email: Use, Access and Retention" available on the FOIA Council website.

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#### Resources for FOIA Questions

##### VA Freedom of Information Advisory Council:

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##### Virginia Municipal League:

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##### Library of Virginia: (records management Q's)

Jeffrey L. Snyder, *Manager*

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<http://www.lva.lib.va.us/whatwedo/records/index.htm>

# THE FREEDOM OF INFORMATION ACT AND LOCAL GOVERNMENT OFFICIALS



Prepared by the Virginia Freedom of  
Information Advisory Council  
in cooperation with  
the Virginia Association of Counties  
and  
the Virginia Municipal League



Virginia Association of Counties



<p>FOIA AND LOCAL GOVERNMENT OFFICIALS</p>	<p>FOIA AND LOCAL GOVERNMENT OFFICIALS</p>	<p>FOIA AND LOCAL GOVERNMENT OFFICIALS</p>
<p><b>POLICY OF FOIA</b>  <i>By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.</i>  <i>Unless a public body or public official specifically elects to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.</i></p>	<p><b>MEETING REQUIREMENTS</b>  <b>What is considered a MEETING under FOIA for board of supervisors or city or town council members?</b>  <i>ANY gathering, including work sessions, of the constituent membership, sitting (or through telephonic or video equipment pursuant to 2.2-3708.1) as:</i> <ul style="list-style-type: none"> <li>the board or council, or</li> <li>an informal assemblage of               <ul style="list-style-type: none"> <li>(i) as many as three members, or</li> <li>(ii) a quorum, if less than three, of the constituent membership,</li> </ul> </li> </ul> <b>WHEREVER the gathering is held; WITH or WITHOUT minutes being taken; AND</b>  <b>WHETHER OR NOT votes are cast.</b>  <b>NOTE:</b> This also applies to ANY meeting, including work sessions, of any subgroup of the board or council.  <b>WHAT IS NOT A MEETING?</b> <ul style="list-style-type: none"> <li>The gathering of employees; or</li> <li>The gathering or attendance of two or more board/council members at:               <ul style="list-style-type: none"> <li>Any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance</li> </ul> </li> </ul> </p>	<p><b>WHAT IS NOT A MEETING (cont'd)</b>          was not called or prearranged with any purpose of discussing or transacting any business; OR         <ul style="list-style-type: none"> <li>A public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to discuss or transact public business.</li> </ul> <p><b>*OTHER FOIA PROVISIONS*</b></p> <ul style="list-style-type: none"> <li><b>MINUTES: ARE REQUIRED</b> for any meeting of the board or council.</li> <li>Minutes are also required for any subcommittee thereof <b>ONLY</b> if a majority of the board/council members are on the subcommittee.</li> <li><b>VOTING: NO secret or written ballots are ever allowed.</b></li> <li><b>POLLING:</b> You MAY contact individual members <b>separately</b> to ascertain their positions by phone, letter or email. <b>REMEMBER:</b> This exemption <b>CANNOT</b> be used in lieu of a meeting.</li> <li><b>CLOSED MEETINGS:</b> Allowed <b>ONLY</b> as specifically authorized by FOIA and require motion stating purpose, Code cite <i>and</i> subject. [See § 2.2-3711 of FOIA]</li> </ul> </p>



# E-MAIL & MEETINGS under the VIRGINIA FREEDOM OF INFORMATION ACT

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## I. Introduction

As technology advances, new and efficient ways to communicate have evolved. Perhaps the most prevalent advancement in carrying out day-to-day communications at work or at home is e-mail. E-mail is a way to send correspondence on a one-to-one or one-to-many basis over the computer. Each user has an e-mail address, and messages received at that address are stored in electronic mailboxes until the recipient retrieves the message. After reading the message, the user may save it on his computer, forward it to other e-mail addresses, respond to the sender, respond to the sender and other recipients of the same e-mail, or delete it.

The use of e-mail can blur the line between correspondence and a meeting under FOIA. E-mail is similar to traditional paper correspondence in many ways, and is a written form of communication that is by definition a record under FOIA. However, from a practical perspective, e-mail is often used as a substitute for a phone call and can be used to communicate quickly with multiple people at once, making it more akin to a meeting. While FOIA addresses electronic meetings held by audio or audio/visual means, it does not explicitly address the use of e-mail in a meetings context.<sup>1</sup> The Virginia Supreme Court, however, recently decided whether the exchange of e-mails between members of a city council could constitute a meeting under FOIA. A review of the Supreme Court's decision follows under the heading "II. The Impact of the Virginia Supreme decision in *Beck v. Shelton*."

The use of e-mail by public officials is clearly allowed by FOIA. One member of a public body may individually e-mail other members, even if the e-mail relates to public business.<sup>2</sup> Questions arise based on the manner in which a recipient responds to an e-

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<sup>1</sup> See § 2.2-3708, which expressly allows state public bodies to hold audio or audio/visual meetings. See also Chapter 704 of the 1997 Acts of Assembly, establishing a pilot program for certain state public bodies to hold audio/visual meetings.

<sup>2</sup> See § 2.2-3710(B). See also 1999 Op. Atty. Gen. Va. 12 (The meeting provisions of FOIA do not prohibit members of a public body from sending e-mail to other members of the same public body. The decision rests on the fact that the use of e-mail does not result in simultaneous communication like a traditional meeting.); Virginia Freedom of Information Advisory Opinion 19 (2004) (two members of a three-member electoral board may communicate using e-mail without violating FOIA so long as it is not simultaneous communication that would comprise a meeting for FOIA purposes).

mail addressed to three or more members of a public body. When responding to an e-mail, it is possible to "respond to sender" or to "respond to all recipients." If a recipient chooses "respond to all," then three or more members of a public body will see not only the initial e-mail, but also another member's response. Other members could then, in turn, respond to the e-mail or the ensuing responses. In the end, three or more members of a public body could have used the chain of e-mail to discuss, and possibly reach a conclusion, about a matter relating to the transaction of public business.<sup>3</sup>

It can be argued that a meeting, as defined in FOIA, refers to a simultaneous discussion (such as a face-to-face discussion or a phone conversation), and that the use of e-mail is not necessarily simultaneous among users. If a user only checks his e-mail once a day, 24 hours could pass between an initial e-mail and a response. However, it is also possible for users to be logged into their e-mail system at the same time, and the lag time between e-mails might only be the time that it takes to compose a response and hit send.

## II. The Impact of the Virginia Supreme Court decision in *Beck v. Shelton*.<sup>4</sup>

On March 5, 2004, the Virginia Supreme Court ("the Court") issued an opinion concerning the Virginia Freedom of Information Act ("FOIA," § 2.2-3700 et seq. of the Code of Virginia) (*Beck v. Shelton*, No. 030723), with a holding directly relevant to all elected officials in Virginia -- from members of the General Assembly to members of local school boards. *Beck* has primarily drawn interest because it is the first authoritative statement of law in Virginia as to whether use of electronic mail ("e-mail") by public officials could constitute a meeting under FOIA, but it also examines broader issues as to the applicability of FOIA to public officials and the definition of a meeting. The Court held that FOIA does not apply to members-elect of a public body; that generally, use of e-mail by three or more members of a public body to discuss public business is not a meeting; and that a gathering of three members of a public body at a citizen-organized meeting did not violate FOIA. For the purposes of this document, only those portions of the Court's holding related to e-mail and meetings under FOIA will be discussed.<sup>5</sup>

### Facts

Three plaintiffs filed a petition for writ of mandamus and injunction in Fredericksburg Circuit Court against five members of the Fredericksburg City Council. The petition alleged that the defendants used e-mail to discuss and decide public business, and that such use of e-mail constituted an improper meeting under FOIA.

### Holding

<sup>3</sup> For a similar discussion, see Virginia Freedom of Information Advisory Opinion 01 (2001) (finding that the use of a listserv by members of a public body constitutes a meeting if used to discuss or transact public business. A listserv different from regular e-mail, because users must join a listserv, and all messages posted to the listserv are automatically sent to each member of the listserv.)

<sup>4</sup> Excerpted from the Division of Legislative Services' *Virginia Legislative Issue Brief*, No. 37, March 2004, written by Lisa Wallmeyer and Maria J.K. Everett.

<sup>5</sup> For a complete analysis of the *Beck v. Shelton* case, please refer to the FOIA Council's website: <http://foiacouncil.dls.virginia.gov>.



The Court considered the question of whether use of e-mail could be a meeting under FOIA. The Court overturned the trial court's decision that use of e-mail to reach a consensus on a matter of public business was a meeting, on the grounds that the e-mails in question were similar to letters sent via U.S. Mail or facsimile.

The Court examined the definition of a meeting at § 2.2-3701, which includes *an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership*. The Court noted that e-mail can be similar to traditional forms of written correspondence, in that there may be significant delay between the time the communication is sent and received, or when a response is sent. In the instant case, the shortest interval between any two emails was more than four hours, and the longest was over two days. The Court agreed with the trial court that the dispositive consideration in examining e-mail is how the e-mail is used. In reviewing this standard, the Court focused on the language in the definition of a meeting that includes "an informal assemblage." "Assemblage," the Court concluded, means to bring together at the same time, and inherently entails simultaneity. The Court held that there is no "virtually simultaneous interaction" when e-mail is used as the functional equivalent of a letter communicated by U.S. Mail, courier, or facsimile transmission<sup>6</sup>. In further support of this conclusion, the Court noted that the Attorney General of Virginia had previously found that "transmitting messages through an electronic mail system is essentially a form of written communication."<sup>7</sup> While not binding, the General Assembly "is presumed to have knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."<sup>8</sup>

It is important to note that the Court did not hold that use of e-mail could never be a meeting under FOIA. Instead, the Court indicated that the dispositive determination in examining e-mail under the meeting provisions of FOIA was to look at how the e-mail was used. The trial court answered this question by reviewing the end result -- i.e., that e-mail was used to reach a consensus. According to the Supreme Court, this question is more appropriately answered by reviewing whether the e-mail was used as a functional equivalent of traditional correspondence.

This opinion clarifies that members of a public body need not refrain from using e-mail, but they should be cautioned against using e-mail among three or more members of the public body that is akin to using the telephone and has an element of simultaneity. The court did not establish a time frame as to when the use of e-mail may be considered simultaneous, nor did it address the use of chat rooms, instant messaging, or listservs.

This decision does not alter the fact that the records generated by e-mail fall under FOIA's definition of a public record. E-mails concerning public business are available for

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<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 11 (citing 1999 Op. Atty. Gen. 12).

<sup>8</sup> *Id.* at 12 (citing *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E. 2d 603, 605-06 (1983)).



inspection or copying upon request, unless a specific statutory exemption allows a particular e-mail or contents thereof to be withheld. Furthermore, e-mails must be retained like other public records subject to the provisions of the Virginia Public Records Act (§ 42.1-76 et seq).

### Conclusion

The Court's holding has implications for members of all public bodies in the Commonwealth. With e-mail, the user must consider whether the e-mail is being used akin to traditional correspondence, or whether the e-mail has an element of simultaneity and is more like a telephone call between three or more members of the public body. This decision of the Court was fact-specific. Although no bright-line rules emerged in establishing what is or is not a meeting, the ruling underscores the notion that all meetings are presumed open under FOIA. Determining whether a particular e-mail discussion falls outside the parameters of a meeting must be considered carefully, on a case-by-case basis, examining all relevant facts.

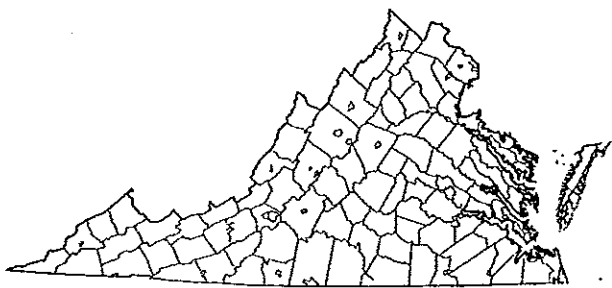
### **III. Tips for Using E-mail**

It may be helpful to keep in mind the following tips:

- Remember the underlying principle of the open meeting provisions of FOIA -the public has the right to witness the operations of government. If you question whether your e-mail communication might lead to the deliberation of public business by three or more members of a public body in real time (i.e., an element of simultaneity), then you may be better served by saving that communication for a public meeting.
- If you receive an e-mail where three or more recipients are members of the same public body, and you wish to respond, choose "respond to sender" instead of "respond to all." One-on-one communications are clearly allowed under FOIA, and this will avoid an e-mail discussion among three or more members.
- When composing an e-mail to send to three or more members of a public body, enter the recipients' addresses in the "blind carbon copy" (bcc) field instead of in the "to" field. By doing this, an individual recipient will not be able to automatically respond to anyone but you.

Updated May, 2009.





## LOCAL AND REGIONAL PUBLIC BODIES, ELECTRONIC MEETINGS, and the VIRGINIA FREEDOM OF INFORMATION ACT

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### IN GENERAL

Only **STATE** public bodies are authorized to hold meetings by electronic means (teleconference or combined audio and video) as set out in § 2.2-3708 of FOIA. As a general rule, local or regional public bodies are **NOT** authorized to hold meetings by electronic means. However, there are two exceptions to this general rule (described in more detail below): electronic participation by individual members, and states of emergency declared by the Governor. However, these are the **ONLY** exceptions - in all other situations, local and regional public bodies may **NOT** meet by electronic means.

The first exception to the general rule is a provision for *individual members* of public bodies to participate by electronic means under specific conditions. Individual members of all types of public bodies - state, regional, and local - may participate by electronic means when a medical condition or personal emergency on the day of the meeting prevents them from physically attending the meeting. Individual members of *regional* public bodies may also participate in a meeting of the regional public body if such member's principal residence is more than 60 miles from the meeting location identified in the required notice for such meeting. Participation by individual members, however, is subject to the procedural requirements set out in § 2.2-3708.1 of FOIA. Please see Appendix A for the rules of participation.

Effective July 1, 2008, the second exception to the general rule is a provision allowing "any local governing body, school board, or any authority, board, bureau, commission, district, or agency of local government" to meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii)



the purpose of the meeting is to address the emergency. The local public body convening a meeting in accordance with this subsection shall (a) give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the local public body conducting the meeting; (b) make arrangements for public access to such meeting; and (c) otherwise comply with the provisions of this section. The nature of the emergency and the fact that the meeting was held by electronic communication means shall be stated in the minutes."

Finally, keep in mind that nothing in FOIA should be construed as to prohibit the use of audio or audio/visual means to increase public participation at meetings. If members of a public body are physically assembled at one location, but wish to allow members of the public to listen or provide comment electronically, these heightened procedural requirements would not prevent such public access.

Please contact the FOIA Council with any questions you may have concerning the requirements for conducting electronic communication meetings.

**Toll-Free 1-866-448-4100**

**Email: [foiacouncil@dls.virginia.gov](mailto:foiacouncil@dls.virginia.gov)**

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## APPENDIX A

This Appendix A sets forth the requirements of § 2.2-3708.1, which allows *individual members* of any public body to participate by electronic communication means (teleconference or combined audio and video) under specific, limited circumstances. Members of local and regional public bodies may **only** participate in meetings by electronic means as allowed under § 2.2-3708.1, or in situations where the Governor has declared a state of emergency as allowed under subsection G of § 2.2-3708 (described in Appendix B hereafter).

### ELECTRONIC PARTICIPATION UNDER § 2.2-3708.1

As of July 1, 2007, § 2.2-3708.1 allows *individual members* of public bodies to participate in a meeting through electronic communication means from a remote location that is not open to the public in the event of an emergency, temporary or permanent disability or other medical condition, or when a member of a regional public body's principal residence is more than 60 miles from the primary meeting location. For a member to participate in the above described manner, FOIA requires that a quorum of the public body be physically assembled at the primary or central meeting location and that the public body make arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location. The requirements for such participation are examined in further detail below.

#### A. Participation in an emergency; procedural requirements:

1. Physically assembled quorum required;
2. Remote member's voice must be heard by all;
3. Notify chair of the public body on the day of the meeting;
4. Identify nature of the emergency;
5. Member's remote participation must be approved by majority vote of those physically assembled at the meeting location; and
6. Nature of emergency and remote location must be recorded in the minutes.

#### NOTE:

Participation because of emergency is limited to two (2) meetings/year, or 25% of the meetings of the public body, whichever is *less*.



If a member's participation is not approved by a majority of the public body, the member may continue to monitor the meeting from his remote location, but he may not participate in proceeding and may not be counted as present at the meeting.

EXAMPLES:

- Flat tire on the way to the meeting, call in from cell phone @ side of the road;
- Traffic congestion or stoppage;
- Personal, family or business emergency; or
- Blizzard, flood or other sudden severe weather conditions that prevent travel to the meeting location.

**B. Participation by member with physical disability or other medical condition; procedural requirements:**

1. Physically assembled quorum required;
2. Remote member's voice must be heard by all;
3. Member notifies chair of inability to attend due to temporary or permanent physical disability or other medical condition that prevents physical attendance; and
4. Fact of disability (or other condition) and remote location must be recorded in the minutes.

EXAMPLES:

- Temporary hospitalization or confined to home;
- Contagious illness; or
- Any permanent physical disability that prevents travel to the meeting location

**C. Participation by member of regional public body who lives 60 miles or more from meeting location; procedural requirements:**

1. Physically assembled quorum required;
2. Remote member's voice must be heard by all;
3. Notify chair of the public body on the day of the meeting;
4. Member's remote participation approved by majority vote of those physically assembled at the meeting location; and
5. Remote location must be recorded in the minutes.



NOTE:

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, whose members are appointed by the participating local governing bodies, and such unit includes two or more counties or cities.

This provision does NOT apply to state or local public bodies.

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## APPENDIX B

This Appendix B sets forth the requirements of subsection G of § 2.2-3708, which authorize local and regional public bodies to hold electronic communication meetings (teleconference or combined audio and video) in situations where the Governor has declared a state of emergency in accordance with § 44-146.17.

Effective July 1, 2008, "any local governing body, school board, or any authority, board, bureau, commission, district, or agency of local government" may meet by electronic communication means--

- Without a quorum of the public body physically assembled at one location;
- When the Governor has declared a state of emergency in accordance with § 44-146.17,
- Provided:
  - a. The catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and
  - b. The purpose of the meeting is to address the emergency.
- In addition, the local public body convening an electronic communication meeting must:
  - a. Give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the local public body conducting the meeting;
  - b. Make arrangements for public access to such meeting; and
  - c. Otherwise comply with the provisions of § 2.2-3708.
- The nature of the emergency and the fact that the meeting was held by electronic communication means shall be stated in the minutes.

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# ACCESS TO PUBLIC MEETINGS under the VIRGINIA FREEDOM OF INFORMATION ACT

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## I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and the provisions relating to meetings set forth the procedures that a public body must follow in conducting an open meeting and convening in a closed meeting. This outline will break down the procedural requirements, such as what is required in a notice and certifying a closed meeting, and provide practical advice for conducting meetings that comply with FOIA. Appendix A sets forth in detail the requirements for making a motion to convene a closed meeting. Appendix B describes commonly used meeting exemptions of general applicability.

## II. OPEN MEETINGS GENERALLY

### *WHAT IS A MEETING UNDER FOIA?*

A "meeting" is defined as "meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body" where the business of the public body is being discussed or transacted. (Emphasis added.)<sup>1</sup>

### *WHAT IS NOT A MEETING UNDER FOIA?*

1. The gathering of employees of a public body;
2. The gathering or attendance of two or more members of a public body at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, the gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body and the public business is not discussed; or
3. The gathering or attendance of two or more members of a public body at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members

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<sup>1</sup> Statutory reference: § 2.2-3701. FOIA Council Opinions AO-4-00, AO-20-01, AO-10-01, AO-46-01, AO-02-02, AO-06-02, AO-13-03, AO-15-04, AO-20-04, AO-11-05, AO-02-06, AO-10-07, AO-12-08, AO-03-09.



individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting.<sup>2</sup>

### ***MAY A PUBLIC BODY CONDUCT A MEETING BY CONFERENCE CALL OR OTHER ELECTRONIC METHOD?***

Maybe. Prior to July 1, 2007, no local governing body or any other type of local public body may conduct a meeting through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business. However, state public bodies may conduct such meetings under specified circumstances. After July 1, 2007, local and regional public bodies may also allow participation by their members via teleconference or other electronic means under certain limited circumstances.<sup>3</sup>

### ***IF IT IS A MEETING, WHAT DOES FOIA REQUIRE?***

If it is a meeting under FOIA, the law requires that:

1. Notice of the meeting be given;
2. The meeting must be open to the public; and
3. Minutes of the meeting must be taken and preserved.<sup>4</sup>

### ***WHAT IS SUFFICIENT NOTICE?***

Notice must contain the date, time, and location of the meeting. It is also helpful (but not required) to include the agenda for the meeting to inform the public generally of what topics will be discussed at the meeting. If a state public body includes at least one member appointed by the Governor, the notice must also indicate whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.<sup>5</sup>

### ***WHERE TO POST THE NOTICE?***

FOIA requires that notice be posted in two physical locations:

1. In a prominent public location at which notices are regularly posted, and
2. In the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator.
3. State public bodies must also post notice on their own websites and on the Commonwealth Calendar website. Electronic publication of meeting notices by other public bodies is encouraged, but not required.

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<sup>2</sup> Statutory reference: §§ 2.2-3701, 2.2-3707(G). FOIA Council Opinions AO-4-00, AO-10-00, AO-46-01, AO-02-02, AO-13-03, AO-12-04, AO-12-08.

<sup>3</sup> Statutory reference: § 2.2-3708, § 2.2-3708.1. See also Chapter 704 of the Acts of Assembly, as amended. FOIA Advisory Opinions AO-1-01, AO-16-02, AO-21-04, AO-12-08, AO-07-09.

<sup>4</sup> Statutory reference: §§ 2.2-3700, 2.2-3707. FOIA Council Opinions AO-40-01, AO-06-02, AO-17-02, AO-13-03, AO-15-04.

<sup>5</sup> Statutory reference: § 2.2-3707(C). FOIA Council Opinions AO-13-00, AO-3-01, AO-18-01, AO-43-01, AO-06-02, AO-23-03, AO-02-04, AO-06-07, AO-08-07, AO-03-09.



NOTE: Electronic posting must be in addition to the physical posting discussed above.<sup>6</sup>

### ***WHO ELSE IS ENTITLED TO NOTICE OF MEETINGS?***

Any person who annually files a written request for notification with a public body is entitled to receive direct notification of all meetings of that public body. If the person requesting notice does not object, the public body may provide the notice electronically.

The request for notice shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any.<sup>7</sup>

### ***WHEN TO POST THE NOTICE?***

*For regular meetings:* The notice must be posted at least three working days prior to the meeting.

*For special or emergency meetings:* Notice, reasonable under the circumstance, of special or emergency meetings must be given at the same time as the notice provided members of the public body conducting the meeting. FOIA defines an emergency as "an unforeseen circumstance rendering the notice required by FOIA impossible or impracticable and which circumstance requires immediate action."<sup>8</sup>

### ***MAY THE PUBLIC OR MEDIA RECORD THE MEETING?***

Yes. Any person may photograph, film, record or otherwise reproduce any portion of a meeting required to be open.<sup>9</sup>

### ***MAY A PUBLIC BODY RESTRICT THE USE OF RECORDING DEVICES?***

Yes. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming or recording a meeting to prevent interference with the proceedings.<sup>10</sup>

### ***WHEN MUST AGENDA MATERIALS BE AVAILABLE TO THE PUBLIC/MEDIA?***

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<sup>6</sup> Statutory reference: § 2.2-3707(C). FOIA Council Opinions AO-18-01, AO-43-01, AO-08-07, AO-03-09.

<sup>7</sup> Statutory reference: § 2.2-3707(E). FOIA Council Opinions AO-3-01, AO-13-03, AO-23-03, AO-08-07.

<sup>8</sup> Statutory reference: § 2.2-3707(C), (D). FOIA Council Opinions AO-13-00, AO-3-01, AO-18-01, AO-06-02, AO-08-07.

<sup>9</sup> Statutory reference: § 2.2-3707(H). FOIA Council Opinions AO-03-03, AO-10-05.

<sup>10</sup> Statutory reference: § 2.2-3707(H). FOIA Council Opinions AO-03-03, AO-10-05.



At least one copy of all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting must be made available for public inspection at the same time the packets or materials are furnished to the members of the public body.<sup>11</sup>

### *ARE THERE ANY EXCEPTIONS FOR TAKING MINUTES?*

Yes. Minutes are only required to be taken at open meetings, and are not required during closed meetings. Minutes are also not required to be taken at deliberations of:

1. Standing and other committees of the General Assembly;
2. Legislative interim study commissions and committees, including the Virginia Code Commission;
3. Study committees or commissions appointed by the Governor; or
4. Study commissions or study committees, or any other committees or subcommittees appointed by the governing body or school board of a county, city or town, except where the membership of the commission, committee or subcommittee includes a majority of the members of the governing body.<sup>12</sup>

### *WHAT DO MINUTES HAVE TO LOOK LIKE?*

Minutes are required (except as noted above) of all open meetings, and must include: the date, time, and location of the meeting; the members of the public body present and absent; a summary of matters discussed; and a record of any votes taken. In addition, motions to enter into a closed meeting and certification after a closed meeting must be recorded in the minutes.<sup>13</sup>

### *ARE MINUTES PUBLIC RECORDS UNDER FOIA?*

Yes. Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual recordings are public records and must be released upon request.<sup>14</sup>

### *IS THERE AN AFFIRMATIVE OBLIGATION TO POST MINUTES?*

Yes, but only for state agencies in the executive branch.

All boards, commissions, councils, and other public bodies created in the executive branch of state government and subject to FOIA must post minutes of their meetings on the Commonwealth Calendar.

Draft minutes of meetings must be posted as soon as possible but no later than ten working days after the conclusion of the meeting. Final approved meeting minutes must be posted within three working days of final approval of the minutes.<sup>15</sup>

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<sup>11</sup> Statutory reference: § 2.2-3707(F). FOIA Council Opinions AO-3-01, AO-35-01, AO-23-03.

<sup>12</sup> Statutory reference: § 2.2-3707(I). FOIA Council Opinion AO-08-07.

<sup>13</sup> Statutory reference: § 2.2-3707(I), 2.2-3712(A), (D). FOIA Council Opinions AO-25-01, AO-01-06.

<sup>14</sup> Statutory reference: § 2.2-3707(I). FOIA Council Opinions AO-13-03, AO-25-04.

<sup>15</sup> Statutory reference: § 2.2-3707.1.





### ***MUST ALL VOTES OF A PUBLIC BODY TAKE PLACE IN AN OPEN MEETING?***

Yes. Any and all votes taken to authorize the transaction of any public business must be taken and recorded in an open meeting.

A public body may not vote by secret or written ballot.<sup>16</sup>

### ***IS IT A FOIA VIOLATION TO POLL MEMBERS OF A PUBLIC BODY?***

No. Nothing in FOIA prohibits separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member's position with respect to the transaction of public business. Such contact may be done in person, by telephone or by electronic communication, provided the contact is done on a basis that does not constitute a meeting as defined in FOIA.<sup>17</sup>

## **III. CLOSED MEETING PROCEDURES**

### ***WHAT DOES A PUBLIC BODY HAVE TO DO TO CLOSE A MEETING?***

In order to conduct a closed meeting, the public body must take an affirmative recorded vote in an open meeting approving a motion that:

1. Identifies the subject matter for the closed meeting;
2. States the purpose of the closed meeting; and
3. Makes specific reference to the applicable exemption from the open meeting requirements.

The motion must be set forth in detail in the minutes of the open meeting.

A general reference to the provisions of FOIA, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting.<sup>18</sup>

### ***WHAT MAY BE DISCUSSED DURING A CLOSED MEETING?***

A public body holding a closed meeting must restrict its discussions during the closed meeting to those matters specifically exempted from the provisions of this chapter and identified in the motion.<sup>19</sup>

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<sup>16</sup> Statutory reference: § 2.2-3710(A). FOIA Council Opinions AO-9-00, AO-15-02, AO-01-03, AO-13-03, AO-01-05, AO-05-09, AO-07-09.

<sup>17</sup> Statutory reference: § 2.2-3710(B). FOIA Council Opinions AO-08-02, AO-15-02, AO-01-03, AO-07-09.

<sup>18</sup> Statutory reference: § 2.2-3712(A). FOIA Council Opinions AO-8-00, AO-19-00, AO-14-01, AO-38-01, AO-45-01, AO-08-02, AO-17-02, AO-02-04, AO-24-04, AO-01-05, AO-06-07, AO-13-07, AO-04-08, AO-13-09.

<sup>19</sup> Statutory reference: § 2.2-3712(C). FOIA Council Opinions AO-8-00, AO-13-07, AO-13-09.



### *AT THE END OF A CLOSED SESSION, WHAT DOES THE PUBLIC BODY HAVE TO DO?*

At the conclusion of any closed meeting, the public body holding the meeting must immediately reconvene in an open meeting and take a roll call or other recorded vote certifying that to the best of each member's knowledge:

1. Only public business matters lawfully exempted from open meeting requirements under this chapter, and
2. Only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body.

The vote must be included in the minutes of the open meeting.

Any member of the public body, who believes that there was a departure from the requirements of (1) or (2) above must state so prior to the vote, and indicate the substance of the departure that, in his judgment, has taken place. This statement must also be recorded in the minutes of the open meeting.<sup>20</sup>

### *WHEN DO DECISIONS MADE IN A CLOSED MEETING BECOME OFFICIAL ACTIONS OF THE PUBLIC BODY?*

Decisions become official when the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation or motion agreed to in the closed meeting. Otherwise, no resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in the closed meeting is effective.

Public officers improperly selected due to the failure of the public body to comply with the other provisions of this section will become *de facto* officers and, as such, their official actions are valid until they obtain notice of the legal defect in their election.<sup>21</sup>

### *CAN THERE BE A CLOSED MEETING WITHOUT FIRST HAVING AN OPEN MEETING?*

No. A closed meeting can take place only within the context of an open meeting, even if the closed meeting is the only agenda item. A closed meeting motion must be made in an open meeting. After the conclusion of the closed meeting, the members of the public body must reconvene in an open meeting to certify that they restricted their discussion during the closed meeting to those matters specifically exempted from the provisions of FOIA and identified in the motion.<sup>22</sup>

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<sup>20</sup> Statutory reference: § 2.2-3712(D), (E). FOIA Council Opinions AO-8-00, AO-17-02, AO-02-04, AO-06-07, AO-04-08.

<sup>21</sup> Statutory reference: § 2.2-3711(B), (C). FOIA Council Opinions AO-23-01, AO-38-01, AO-15-02, AO-01-03, AO-13-03, AO-24-04, AO-01-05, AO-13-09.

<sup>22</sup> FOIA Council Opinion AO-02-04, AO-06-07, AO-08-07, AO-13-09, AO-02-10.



## APPENDIX A

### HOW TO MAKE A MOTION TO CONVENE A CLOSED MEETING

#### The Requirements

Section 2.2-3712(A) states that *[n]o closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting and (iii) makes specific reference to the applicable exemption from open meeting requirements.* (Emphasis added.)

FOIA Council opinions have held that a motion that lacks any of these three elements is insufficient under the law, and would constitute a procedural violation.<sup>23</sup> Here's a step-by-step look at how to put together a motion that meets all three requirements:

#### *1. Identify the subject matter:*

- The identification of the subject goes beyond a general reference to the exemption, and provides the public with information as to specifically why the closed meeting will be held. The subject matter is descriptive of the particular fact scenario or circumstances that will be discussed by the public body during the closed meeting.
- The specificity required for identification of the subject must be determined on a case-by-case basis. It involves balancing FOIA's policy of affording citizens every opportunity to witness the operations of government with the need of the public body to hold certain discussions in private. The identification of the subject need not be so specific as to defeat the reason for holding a closed meeting in the first place.
- Examples of identification of the subject: discussion of candidates for the appointment of a new city manager; discussion of the appropriate disciplinary action to take against a student for violation of school policy; discussion of probable litigation relating to highway construction.<sup>24</sup>

<sup>23</sup> FOIA Advisory Opinions AO-14-01, AO-38-01, AO-45-01, AO-08-02, AO-24-04, AO-01-05, AO-06-07, AO-04-08, AO-13-09, AO-02-10.

<sup>24</sup> Example of probable litigation taken from FOIA Advisory Opinion AO-14-01.



*2. State the purpose:*

- The purpose refers to the general, statutorily allowed meeting exemptions set forth at § 2.2-3711(A). Section 2.2-3711(A) states that *public bodies may only hold closed meetings for the following purposes* (emphasis added) and then sets forth the exemptions.
- Examples of subject matter: the personnel exemption; the scholastic exemption; the consultation with legal counsel exemption.

*3. Make specific reference to the applicable exemption:*

- All of the meetings exemptions can be found at § 2.2-3711(A). It is not enough to cite to this general code provision, because § 2.2-3711(A) includes 29 different exemptions. Instead, the citation must be as specific as possible.
- Examples of specific code references: § 2.2-3711(A)(1); § 2.2-3711(A)(2); § 2.2-3711(A)(7).

### Putting It All Together

Based upon the analysis above, here are three examples of motions to go into closed session that satisfy the minimum requirements of § 2.2-2712(A). It is always appropriate to include more information, and any motion should be tailored with additional facts describing the particular scenario being addressed by the public body.

1. I move that (insert name of public body) convene in closed session to discuss the candidates being considered for the appointment of a new city manager pursuant to the personnel exemption at § 2.2-3711(A)(1) of the Code of Virginia.
2. I move that (insert name of public body) convene in closed session to discuss the appropriate disciplinary action to take against an individual student for violation of school policy pursuant to the scholastic exemption at § 2.2-3711(A)(2) of the Code of Virginia.
3. I move that (insert name of public body) convene in closed session to meet with legal counsel about probable litigation relating to highway construction pursuant to the consultation with legal counsel exemption at § 2.2-3711(A)(7) of the Code of Virginia.

Remember, the appropriateness of any given motion is fact-based, and it is difficult to provide a "fill-in-the-blank" model motion that works in all situations. When drafting a motion, go down the check list and ensure that you have included all three elements. Keep in mind the balancing required to keep citizens informed of the workings of a public body while maintaining the integrity of the closed session. Please do not hesitate to contact the FOIA Council to discuss these requirements or the sufficiency of a specific motion.

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## APPENDIX B

### Meeting Exemptions of General Applicability

As of July 2008, FOIA contains more than 40 open meeting exemptions. Although many of these exemptions apply to specific agencies or to very content-specific discussions, there are several open meeting exemptions of general applicability that may be used by virtually all public bodies. The open meeting exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

§ 2.2-3711(A)(1): Personnel. Provides an exemption for:

Discussion, consideration or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter that involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board.

§ 2.2-3711(A)(2): Students. Provides an exemption for:

Discussion or consideration of admission or disciplinary matters or any other matters that would involve the disclosure of information contained in a scholastic record concerning any student of any Virginia public institution of higher education or any state school system. However, any such student, legal counsel and, if the student is a minor, the student's parents or legal guardians shall be permitted to be present during the taking of testimony or presentation of evidence at a closed meeting, if such student, parents or guardians so request in writing and such request is submitted to the presiding officer of the appropriate board.

§ 2.2-3711(A)(3): Acquisition & disposition of property. Provides an exemption for:

Discussion or consideration of the acquisition of real property for a public purpose, or of the disposition of publicly held real property, where discussion in an open meeting would adversely affect the bargaining position or negotiating strategy of the public body.

§ 2.2-3711(A)(4): Privacy. Provides an exemption for:

The protection of the privacy of individuals in personal matters not related to public business.

§ 2.2-3711(A)(5): Prospective business. Provides an exemption for:



Discussion concerning a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community.

§ 2.2-3711(A)(6): Investment of public funds. Provides an exemption for:

Discussion or consideration of the investment of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected.

§ 2.2-3711(A)(7): Legal advice. Provides an exemption for:

Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body; and consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel. For the purposes of this subdivision, "probable litigation" means litigation that has been specifically threatened or on which the public body or its legal counsel has a reasonable basis to believe will be commenced by or against a known party. Nothing in this subdivision shall be construed to permit the closure of a meeting merely because an attorney representing the public body is in attendance or is consulted on a matter.

§ 2.2-3711(A)(11): Tests & exams. Provides an exemption for:

Discussion or consideration of tests, examinations or other records excluded from this chapter pursuant to subdivision A 11 of § 2.2-3705.

§ 2.2-3711(A)(15): Medical. Provides an exemption for:

Discussion or consideration of medical and mental records excluded from this chapter pursuant to subdivision A 5 of § 2.2-3705.

§ 2.2-3711(A)(20): Public safety. Provides an exemption for:

Discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff members, legal counsel, or law-enforcement or emergency service officials concerning actions taken to respond to such activity or a related threat to public safety; or discussion of reports or plans related to the security of any governmental facility, building or structure, or the safety of persons using such facility, building or structure.

§ 2.2-3711(A)(29). Contracts. Provides an exemption for:

Discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such



contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body.

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July 2010

